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August 17, 2004

VIA OVERNIGHT DELIVERY

Ms. Mary L. Cottrell, Secretary
Massachusetts Department of Telecommunications and Energy
One South Station
Boston, Massachusetts 02110

Re: D.T.E. 03-60: Proceeding by the Department of Telecommunications and Energy on its Own Motion to Implement the Requirements of the Federal Communications Commission's Triennial Review Order Regarding Switching for Mass Market Customers

Dear Ms. Cottrell:

A.R.C. Networks Inc. d/b/a InfoHighway Communications, Broadview Networks Inc., Broadview NP Acquisition Corp., Cleartel Telecommunications, Inc. f/k/a Essex Acquisition Corp., DSCI Corporation, Metropolitan Telecommunications, Inc. (the "Joint Parties"), through counsel, hereby submit for filing in the above-referenced proceeding before the Massachusetts Department of Telecommunications and Energy these Reply Comments responding to the Department's June 15, 2004 Letter Order. Enclosed please find an original and ten (10) copies of these Comments, a duplicate and a self-addressed, postage-paid envelope. Please date-stamp the duplicate upon receipt and return it in the envelope provide.

Please feel free to contact Brett Heather Freedson at (202) 887-1211 if you have any questions regarding this filing.

Respectfully submitted,

Erin Weber Emmott

Erin Weber Emmott (BBO# 644405)
Counsel to the Joint Parties

cc: Service List (via email)

DC01/FREEB/223471.1

Before the
COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS & ENERGY

Proceeding by the Department of Telecommunications and Energy on its Own Motion to Implement the Requirements of the Federal Communications Commission's *Triennial Review Order* Regarding Switching for Mass Market Customers	))))))	D.T.E. 03-60

REPLY COMMENTS OF THE JOINT PARTIES

A.R.C. Networks Inc. d/b/a InfoHighway Communications, Broadview Networks Inc., Broadview NP Acquisition Corp., Cleartel Telecommunications, Inc. f/k/a Essex Acquisition Corp., DSCI Corporation,[1] and Metropolitan Telecommunications, Inc. (the "Joint Parties"), by their attorneys and pursuant to the June 15, 2004 Letter Order of the Massachusetts Department of Telecommunications and Energy (the "Department") in the above-captioned proceeding, respectfully submit these reply comments responding to the Department's Briefing Questions set forth therein and the comments of Verizon New England Inc. d/b/a Verizon Massachusetts ("Verizon").[2]

The decision of the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") in *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*") does not, as Verizon asserts, immediately displace its longstanding obligation to provide to competitive local exchange carriers ("CLECs") within Massachusetts access to its network elements, including local switching, dedicated transport and high-capacity loop facilities, on an unbundled basis and at TELRIC rates. Indeed, Verizon does not dispute that

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1 DSCI Corporation is separately represented by counsel in the above-captioned proceeding, but joins the Joint Parties in filing these Reply Comments.

2 Verizon Massachusetts' Reply to Briefing Questions, filed July 30, 2004 ("Verizon Reply").

section 271 of the Communications Act of 1934, as amended, 47 U.S.C. § 271 (the "Act"), the Verizon Merger Order, state law and Department-approved interconnection agreements impose on Verizon an independent obligation to provide to Massachusetts CLECs unbundled access to its network elements. Rather, Verizon asserts only that such unbundling obligations somehow have disappeared in the wake of the *USTA II* mandate. That is not the case.

As discussed more fully below, Verizon's obligation to provide to Massachusetts CLECs, including the Joint Parties, access to its network elements, on an unbundled basis and at TELRIC rates, remains in full force and effect unless and until the Department conclusively determines that a specific contractual arrangement permits Verizon to discontinue its offering of unbundled network elements ("UNEs") in accordance with applicable federal and state law. In so doing, the Department must interpret and enforce varying contractual change of law provisions in the context of *all* sources of Verizon's unbundling obligations, including, without limitation, section 271 of the Act, the Verizon Merger Order[3] and applicable state law. Accordingly, the Department must reject any generic claim by Verizon that existing federal and state law permit Verizon to discontinue its current offering of UNEs upon notice to Massachusetts CLECs.

Importantly, the Department also must oversee ongoing commercial negotiations between Verizon and Massachusetts CLECs of the rates, terms and conditions applicable to the network elements offered by Verizon on an unbundled basis. As discussed more fully in the Comments of the Joint Parties, the broad delegation of authority by Congress to the state commissions, including the Department, under section 252 of the Act requires the Department to

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[3] *In re GTE Corporation, Transferor and Bell Atlantic Corporation, Transferee For Consent to Transfer Control of Domestic and International Section 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, CC Docket No. 98-184, Memorandum Opinion and Order, FCC 00-221, 15 FCC Rcd 14032 (Jun. 16, 2000) ("Verizon Merger Order").

supervise Verizon's ongoing compliance with its unbundling obligations. Indeed, such authority compels the Department to act, as necessary, to ensure compliance through the arbitration process, should voluntary negotiations between the parties prove unsuccessful.

good faith negotiations between Verizon and Massachusetts CLECs of the rates, terms and conditions for network elements offered by Verizon under the Act. Therefore, contrary to Verizon's Reply, the Department maintains a critical supervisory role in such ongoing commercial negotiations between Verizon and Massachusetts CLECs.

I. VERIZON MAY NOT CEASE TO OFFER UNBUNDLED NETWORK ELEMENTS UNDER THE RATES, TERMS AND CONDITIONS SET FORTH IN ITS EXISTING INTERCONNECTION AGREEMENTS

The Joint Parties have asserted,[4] and Verizon does not dispute, that existing interconnection agreements between Verizon and Massachusetts CLECs, including the Joint Parties, require that Verizon offer access to its network elements, on an unbundled basis and at TELRIC rates. The D.C. Circuit's *USTA II* mandate did not itself modify any unbundling obligation agreed to by Verizon and set forth in Verizon's Department-approved interconnection agreements with Massachusetts CLECs. Accordingly, Verizon must offer to Massachusetts CLECs unbundled access to its network elements, under the rates, terms and conditions set forth in its Department-approved interconnection agreements, until such time as those interconnection agreements are properly amended in accordance with an applicable change of law provision.

The existing interconnection agreements between Verizon and Massachusetts CLECs do not permit Verizon to discontinue its current offering of UNEs and combinations of UNEs to requesting carriers based solely on Verizon's unilateral interpretation of applicable

[4] Comments of the Joint Parties, filed July 30, 2004 at 8-9.

federal and state law. To the contrary, the Joint Parties have asserted,[5] and Verizon has concurred,[6] that any unbundling obligation enforced by the Department must reflect the specific contract provisions of existing interconnection agreements between Verizon and Massachusetts CLECs. Accordingly, to properly assess the impact of the *USTA II* mandate on the rates, terms and conditions applicable to UNEs and combinations of UNEs currently offered by Verizon, the Department necessarily must interpret and enforce each of the varying change of law provisions set forth in Verizon's Department-approved interconnection agreements.

In this proceeding, Verizon did not demonstrate that *any* Department-approved interconnection agreement permits Verizon, "either immediately or after a specified notice period," to cease offering UNEs and combinations of UNEs to *any* Massachusetts CLEC.[7] Rather, Verizon's Reply offers only a bald assertion that existing interconnection agreements between Verizon and Massachusetts CLECs permit Verizon to discontinue its offering of UNEs and combinations of UNEs no longer subject to any unbundling obligation imposed by section 251(c) of the Act.[8] Indeed, Verizon's Reply makes reference only to illustrative contract language to support its legal position, and lacks meaningful analysis of the specific contract provisions set forth in its Department-approved interconnection agreements, on which Verizon ostensibly relies.[9] Accordingly, Verizon cannot credibly assert any "right" under its existing interconnection agreements to unilaterally discontinue UNEs and combinations of UNEs currently offered to Massachusetts CLECs, at TELRIC rates.

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5 *See* Comments of the Joint Parties at 12.

6 Verizon Reply at 8-9.

7 *See id.* at 7.

8 *Id.*

9 *See id.* at n. 7.

Of further importance, Verizon's Reply improperly assumes that the *USTA II* mandate eliminates *all* unbundling obligations imposed on Verizon by federal and state law.[10] Specifically, even if the unbundling requirements imposed on Verizon under section 251 of the Act are restricted by the *USTA II* mandate, Verizon nonetheless is obligated, under section 271 of the Act, the Verizon Merger Order and applicable state law, to offer to Massachusetts CLECs unbundled access to its network elements, including local switching, dedicated transport and high-capacity loop facilities.[11] Accordingly, it does not follow from the *USTA II* mandate that the rates, terms and conditions currently applicable to Verizon's offering of UNEs and combinations of UNEs no longer are required under federal and state law. At a minimum, section 252 of the Act requires that the Department determine whether and to what extent the change of law occasioned by the *USTA II* mandate requires corresponding modifications to Verizon's existing business relationships.

II. THE UNBUNDLING OBLIGATIONS IMPOSED ON VERIZON BY THE VERIZON MERGER ORDER REMAIN IN FULL FORCE AND EFFECT

The Verizon Merger Order imposes on Verizon an obligation to provide to requesting carriers UNEs and combinations of UNEs, at TELRIC rates, in accordance with the requirements of the FCC's *UNE Remand Order*[12] and *Line Sharing Order*.[13] The merger condition relevant to Verizon's offering of UNEs and combinations of UNEs is not subject to the

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10 *See id.*

11 Comments of the Joint Parties at 4-8.

12 *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of* 1996, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, FCC 99-238 (rel. Nov. 5, 1999) ("*UNE Remand Order*").

13 *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket Nos. 98-147, 96-98, Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98, FCC 99-355, 14 FCC Rcd 20912 (rel. Dec. 9, 1999).

36-month "sunset provision" prescribed under the Verizon Merger Order, and has not otherwise expired.[14] As discussed more fully in the Comments of the Joint Parties, the unbundling obligations imposed by the Verizon Merger Order currently are in full force and effect, and will remain binding on Verizon until all legal challenges to the FCC's unbundling rules finally are resolved.[15] The FCC's Orders in the *UNE Remand* and *Line Sharing* proceedings, and in subsequent proceedings, including the *Triennial Review Order*,[16] are not yet "final and non-appealable," and accordingly, Verizon must continue to offer to requesting carriers UNEs and combinations of UNEs, including local switching and dedicated transport facilities, at TELRIC rates.

The claim by Verizon that any "independent" unbundling obligation imposed by the Verizon Merger Order "expired of its own force" simply is incorrect.[17] Specifically, the plain language of the Verizon Merger Order excludes from the 36-month "sunset provision" any condition for which a separate time frame was prescribed by the FCC.[18] The merger condition relevant to Verizon's offering of UNEs and combinations of UNEs to requesting carriers expressly states that the unbundling obligations imposed by the Verizon Merger Order shall remain in full force and effect from the date of the Verizon Merger Order, until the date of a "final and non-appealable judicial decision" that effectively terminates Verizon's unbundling

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14 *See* Verizon Merger Order at ¶ 255.

15 Comments of the Joint Parties at 6-8.

16 *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers* (CC Docket No. 01-338); *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996* (CC Docket No. 96-98); *Deployment of Services Offering Advanced Telecommunications Capability* (CC Docket No. 98-147), Report and Order on Remand and Further Notice of Proposed Rulemaking, FCC 03-36, 18 FCC Rcd 16978 (rel. Aug. 21, 2003) ("*Triennial Review Order*"), *vacated and remanded in part, United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004).

17 *See* Verizon Reply at 30.

18 Verizon Merger Order at ¶ 255.

obligations thereunder.[19] Accordingly, the unbundling obligations imposed by the Verizon Merger Order did not expire 36 months following the merger of Bell Atlantic Corporation and GTE Corporation, in July 2003, as Verizon asserts.

Verizon's obligation to provide to requesting carriers UNEs and combinations of UNEs, at TELRIC rates, has not been superseded by the decision of the D.C. Circuit in *United States Telecom Association v. FCC*, 290 F.3d 415 (D.C. 2002) ("*USTA I*"), or by any other Order or judicial decision in the FCC's *UNE Remand* and *Line Sharing* proceeding. Indeed, in *USTA I*, the D.C. remanded for further proceedings the FCC's unbundling rules promulgated under the *UNE Remand Order* and *Line Sharing Order*, applicable to local switching and dedicated transport facilities, and but did not invalidate those rules. In direct response to the *USTA I* mandate, the FCC subsequently issued modified unbundling rules, under the *Triennial Review Order*, that expressly addressed the issues of fact and law raised by the D.C. Circuit. Accordingly, there can be no doubt that the *Triennial Review Order* and the subsequent *USTA II* mandate are in fact a part of the FCC's ongoing *UNE Remand* and *Line Sharing* proceedings.

Importantly, Verizon's assertion that the D.C. Circuit's *USTA I* decision constitutes a "final and non-appealable" judicial decision for purposes of the Verizon Merger Order also in undermined by Verizon's advocacy before the United States Court of Appeals for the Eighth Circuit (the "Eighth Circuit"). Specifically, in its Joint Motion for Expedited Transfer of the *USTA II* case, Verizon persuaded the Eighth Circuit that the FCC's *Triennial Review Order* "is the FCC's attempt to respond to the D.C. Circuit's *USTA* [*I*] decision."[20] Indeed, the

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19 *Id.* at ¶ 316.

20 *Eschelon Telecom, Inc. v. FCC*, No. 03-3212 (and consolidated cases) Joint Motion for Expedited Transfer of BellSouth Corporation, Qwest Communications International Inc., SBC Communications Inc., United States Telecom Association, and the Verizon Telephone Companies, filed September 18, 2004.

Eighth Circuit granted the Joint Motion upon finding that the FCC's *Triennial Review Order* "was entered, in part, on remand from the D.C. Circuit."[21] Accordingly, the Department should not entertain Verizon's flip-flop regarding the effect of the D.C. Circuit's *USTA I* mandate to support its self-serving assertion that the unbundling obligations imposed by the Verizon Merger Order have expired.

III. DEPARTMENT OVERSIGHT WOULD NOT CHILL THE PROGRESS OF COMMERCIAL NEGOTIATIONS BETWEEN VERIZON AND MASSACHUSETTS CLECS

As discussed more fully in the Comments of the Joint Parties, the Act permits, and in fact requires, that the Department oversee the rates, terms and conditions applicable to network elements offered by Verizon to Massachusetts CLECs on an unbundled basis.[22] Specifically, the broad delegation of Congress to the state commissions, including the Department, under section 252 of the Act requires the Department to supervise Verizon's ongoing compliance with the unbundling obligations imposed by sections 251 and 271 of the Act, including the duty of Verizon to negotiate in good faith the rates, terms and conditions applicable to its offering of network elements.[23] To that end, Department oversight of commercial negotiations between Verizon and Massachusetts CLECs of the rates, terms and conditions applicable to Verizon's offering of unbundled access to its network elements is essential to maintain a "level playing field," and thus to ensure that such network elements remain available to Massachusetts CLECs under rates, terms and conditions that are just, reasonable and nondiscriminatory within the meaning of the Act.

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21 *Eschelon Telecom, Inc. v. FCC*, No. 03-3212 (and consolidated cases) Order, September 30, 2004.

22 Comments of the Joint Parties at 10.

23 *See* 47 U.S.C. 251(c)(1).

Verizon is incorrect that Department oversight of commercial negotiations between Verizon and Massachusetts CLECs of rates, terms and conditions applicable to the network elements offered by Verizon would chill the progress of such negotiations.[24] In fact, the reverse is true. The recent experience of the Tennessee Regulatory Authority ("TRA") illustrates this point. In the context of an interconnection agreement arbitration proceeding under section 252 of the Act, the TRA demonstrated the vital role of the state commissions in facilitating good faith negotiations between the incumbent LEC and requesting carriers of the rates, terms and conditions applicable to network elements offered under section 271 of the Act.[25] Throughout the course of its interconnection agreement negotiations with ITC^DeltaCom, BellSouth Telecommunications, Inc. ("BellSouth") flatly refused to move off of its $14.00 per port per month rate for local switching offered under section 271 of the Act. BellSouth also failed to provide any supporting documentation for this rate. Furthermore, even after the TRA specifically requested that BellSouth provide a Final and Best Offer, BellSouth failed to comply with the TRA's request. The TRA stepped in and applied the "just and reasonable" pricing standard, setting a rate of $5.08. But for the exercise of authority by the TRA, ITC^DeltaCom would have been forced to accept BellSouth's $14.00 rate, which would not have permitted it to remain in business within Tennessee. BellSouth's actions have illustrated that true commercial negotiations can occur only if both parties negotiate in good faith to reach a just and reasonable settlement.

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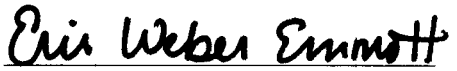
24 *See* Verizon Reply at 30.

25 *See* In re Petition for Arbitration of ITC^DeltaCom with BellSouth Telecommunications, Inc., Tenn. Regulatory Auth., Docket No 03-00119, filed February 7, 2003.

IV. CONCLUSION

Consistent with the foregoing, the Joint Parties submit that Verizon is required under existing federal and state law to provide unbundled access to network elements and combinations at TELRIC rates. The Department is permitted, and in fact required, by the Act to enforce the unbundling obligations imposed on Verizon. Accordingly, the Joint Parties request that the Department take any action necessary to enforce such federal unbundling obligations consistent with state and federal law.

Respectfully submitted,



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Dated: August 17, 2004